



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78 - 1504

HERMINIO CRUZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

PETITION FOR REHEARING

**ALLAN A. ACKERMAN, ESQ.
100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863**

*Attorney for Petitioner,
Herminio Cruz.*

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 9, 1979, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. The granting of certiorari in *Illinois v. Vitale*, #78-1845, October Term, 1979.

The Court granted review in *Illinois v. Vitale*, #78-1845, on or about October 1, 1979. Among the questions presented was whether being put in "two" prosecutions for the same offense violated the Fifth Amendment's Double Jeopardy Clause (26 Cr.L. 4002, 10-3-79). Substantially the same question was recently posed in *U.S. v. Guido*, 597 F.2d 194 (C.A. 9, 1979). In *Guido* the Court set aside a conspiracy conviction [following a bench trial] where the second conviction was under 21 U.S.C. § 846.¹ The Court in *Guido* aligned itself with the decisions from the Second Circuit . . . barring fragmentary prosecutions, same being in violation of the Double Jeopardy Clause (*U.S. v. Jacobson*, 547 F.2d 21 at 23 (C.A. 2, 1976)).

2. There are now three (3) circuits which prohibit fragmenting a single prosecution. Those circuits are the Second Circuit [e.g., *U.S. v. Jacobson*, 547 F.2d 21 at 23 (C.A. 2, 1976), *U.S. v. Sperling*, 560 F.2d 1050 at 1053-1057 (C.A. 2, 1977)]; the Fifth Circuit [e.g., *U.S. v. Kehoe*, 573 F.2d 335 (C.A. 5, 1978), *U.S. v. Ruigomez*, 576 F.2d 1149 (C.A. 5, 1978), *U.S. v. Marable*, 578 F.2d 151 (C.A. 5, 1978)]; and the Court of Appeals for the Ninth Circuit [e.g., *U.S. v. Guido*, 597 F.2d 194 (C.A. 9, 1979)].

¹ The petitioner, Cruz, was tried to the Court in March, 1978, under indictment charging a violation of 21 U.S.C. § 846. Petitioner's trial for the conspiracy charge came after his federal trial in Chicago for violating 21 U.S.C. § 841(a)(1). The government has conceded that the proof in both cases was [is] 99 percent the same. Unlike *Jeffers v. U.S.*, 432 U.S. 158 (1977), the instant petitioner did not seek any severance of trials . . . rather Cruz sought a single trial. The government has never offered any theory that Cruz could not have been tried in one jurisdiction under a single indictment.

3. The question of double jeopardy *vel non* where there are separate prosecutions for the conspiracy and substantive offense was viewed as "a difficult question" by the Court of Appeals for the Fifth Circuit.

In *U.S. v. Garcia*, 589 F.2d 249 (C.A. 5, 1979) the Court suggested that the question (double jeopardy *vel non* on successive trials) was not so easy to answer. The Court stated:

"While conspiracy is normally a sufficiently distinct offense from an underlying substantive offense so that the Double Jeopardy clause does not bar prosecution of both, *U.S. v. Jasso*, 442 F.2d 1054 (5th Cir., 1971), there has been considerable debate in the courts recently about the double jeopardy problem in combined conspiracy and substantive offense prosecutions involving virtually identical elements and evidence. See, e.g., *U.S. v. Austin*, 529 F.2d 559 (6th Cir., 1976), *contra U.S. v. Kearney*, 560 F.2d 1358, 1365, 1367 (9th Cir., 1977). We note that in our own Circuit a District Court recently decided a version of this question, and that the appeal of that decision is pending. *U.S. v. Coward*, No. CR 77-200 A (N.D. Ga. 1978), appeal docketed, No. 78-5175 (5th Cir., March 6, 1978)" (589 F.2d at 251).

4. The brief in opposition, as filed by the Solicitor General, makes absolutely no reference to the question of the split in authorities within the several circuits.²

5. A careful analysis of the record demonstrates that there is not a scintilla of evidence to demonstrate that the government at all *sustained its burden* to show why the Chicago federal indictment [charging a violation of 21 U.S.C. § 841(a)(1) for alleged acts by petitioner in December, 1976] and the Massachusetts federal indict-

² Compare the government's brief in opposition pp. 4-8.

ment [charging a violation of 21 U.S.C. § 846 based upon the very same conduct by the petitioner, e.g., petitioner's possession of narcotics in December, 1976] should not have been joined for a single trial . . . especially where, as here, the petitioner expressly requested a single trial in a single jurisdiction.³

6. The petitioner has been deprived of his right to have his conviction reviewed on the basis of a violation of the Double Jeopardy Clause under circumstances sufficiently startling so that in a strikingly similar case the Court of Appeals for the Ninth Circuit reversed the conviction under its supervisory powers (e.g., 28 U.S.C. § 2106).⁴

³ In our original petition for certiorari at pp. 8-9 we reproduce a letter sent to all government counsel and to the trial court in this case. That letter expressly contains a request for a single trial.

⁴ *U.S. v. Guido*, 597 F.2d 194 (C.A. 9, 1979).

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

ALLAN A. ACKERMAN
Counsel for Petitioner

October 15, 1979

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

ALLAN A. ACKERMAN
Counsel for Petitioner